

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THELEN REID & PRIEST LLP,

No C 06-2071 VRW

Plaintiff,  
Counterdefendant,  
and Counter-  
Counterclaimant,

ORDER

v

FRANÇOIS MARLAND,

Defendant,  
Counterclaimant,  
and Counter-  
Counterdefendant.

\_\_\_\_\_/

Defendant Francois Marland ("Marland") seeks an order directing plaintiff Thelen Reid & Priest LLP ("Thelen") to produce 64 documents for which Thelen has asserted attorney-client and work product privileges. Doc #66 at 2, Doc #93. Marland also seeks an order directing Thelen to identify, on its privilege log, certain

1 documents from after February 2005 that Thelen also claims are  
2 privileged. Doc #99 at 8.

3 Thelen seeks an order compelling production of an August  
4 27, 2002 letter to Marland from his European counsel that Marland  
5 claims was inadvertently produced. Doc #106-1. Marland seeks  
6 sanctions against Thelen, including disqualification of Thelen's  
7 counsel, Keker & Van Nest ("Keker"), for alleged misconduct  
8 relating to Marland's inadvertently produced documents.

9  
10 I

11 This issue arises out a contract dispute between Thelen  
12 and Marland. Thelen is a California limited liability partnership  
13 and a law firm. Doc #11 at 1. Marland is a citizen of France, a  
14 French attorney and currently a resident of Switzerland. Id.

15  
16 A

17 In 1997, Marland approached the New York law firm of Reid  
18 & Priest, claiming to possess information about an undisclosed  
19 fronting agreement, or *contrat de portage*, through which Cr dit  
20 Lyonnais, a French bank, had illegally acquired the insurance  
21 assets of Executive Life Insurance Company (ELIC), an insolvent  
22 California insurance company, at an auction conducted by the  
23 California Department of Insurance (CDOI) in 1991. Doc #78 at 13.  
24 Marland wanted to know whether he could obtain a financial benefit  
25 by divulging information about a July 1991 *contrat de portage* he  
26 claimed to have in his possession to parties in the United States.  
27 Id. After Reid & Priest merged with Thelen, Marrin, Johnson &  
28 Bridges in 1998, Marland met with Gary Fontana, a Thelen partner in

1 San Francisco who had previously worked for other clients on ELIC  
2 proceedings. Id.

3 Between October 1998 and February 1999, Thelen partners  
4 met with representatives of CDOI and attempted to negotiate an  
5 agreement between CDOI and Marland. Id at 14. Ultimately, CDOI  
6 failed to offer acceptable compensation. Id at 15. As a result,  
7 Thelen recommended that Marland initiate his own *qui tam* lawsuit on  
8 behalf of the state of California and CDOI. Id. In February 1999,  
9 Thelen and Marland signed an attorney-client agreement, providing  
10 that Thelen would file a *qui tam* lawsuit against Crédit Lyonnais  
11 and advise or assist CDOI and/or the California Attorney General in  
12 connection with the lawsuit, in exchange for a percentage of any  
13 recovery that Marland received. Id. Thelen helped Marland  
14 incorporate an entity called RoNo LLC to protect his anonymity  
15 through the process. Doc #72 at 2. Marland alleges that Thelen  
16 hurried him to accept an unconsionable fee agreement and that  
17 Fontana signed the agreement without obtaining the necessary firm  
18 approvals. Id at 33.

19 On February 18, 1999, Thelen filed the *qui tam* lawsuit in  
20 San Francisco superior court. Doc #78 at 15. That same day, CDOI  
21 independently filed a separate complaint in Los Angeles County  
22 superior court, raising almost identical claims against many of the  
23 same defendants. Id.

24 Subsequently, in May 1999, CDOI asked Thelen to represent  
25 CDOI in its lawsuit. Id. CDOI agreed to allow Marland and  
26 Marland's European counsel to share a portion of Thelen's legal  
27 fees if it succeeded in the litigation. Id at 16. Thelen claims  
28 that it informed Marland and Marland's European counsel of CDOI's

1 proposal and of the potential conflicts between CDOI's lawsuit and  
2 Marland's own *qui tam* lawsuit. Doc #98 at 3-4. Marland contends  
3 that Thelen never disclosed its potential conflicts from the dual  
4 representation. Doc #72 at 34.

5 Thelen alleges that Marland's claim to possess a copy of  
6 the July 1991 *contrat de portage* was critical to CDOI's decision to  
7 retain Thelen and CDOI's consent to Thelen's sharing fees with  
8 Marland. Doc #78 at 16. Marland contends that Thelen never told  
9 him he had an obligation to preserve or produce evidence that might  
10 have identified him as the whistleblower. Doc #72 at 33.

11 On May 25, 1999, Thelen and CDOI signed a formal  
12 attorney-client agreement, under which CDOI agreed to pay Thelen a  
13 percentage of any recovery it received. Doc #78 at 16. On June 2,  
14 1999, Thelen and Marland executed a written amendment to the  
15 February 1999 agreement under which Marland agreed that Thelen  
16 would take all reasonable steps to dismiss the *qui tam* action. Id.  
17 On June 3, 1999, Thelen, Marland and Marland's European counsel  
18 entered into an agreement under which Thelen agreed to share any  
19 legal fees it received from CDOI with Marland and European counsel.  
20 Id.

21 By July 2001, the Attorney General completed his  
22 investigation of the *qui tam* action and elected to intervene in the  
23 action. Doc #98 at 4. The Attorney General objected to Thelen's  
24 continued representation of RoNo as the *qui tam* relator. Id.  
25 Thelen withdrew from representing RoNo in the *qui tam* action and  
26 assisted Marland in retaining other counsel. Id. Thelen continued  
27 to serve as general counsel to RoNo. Id.

28 \\\

1 Thelen alleges that by December 2001, CDOI's lawsuit had  
2 become much more costly than the parties had anticipated. Doc #78  
3 at 18. Thelen wanted to ask CDOI for a non-recourse advance to the  
4 firm. Id. Because the June 1999 agreement required Thelen to pay  
5 to Marland a percentage of any fees received from CDOI, Thelen  
6 approached Marland to negotiate a restructuring of their fee  
7 sharing relationship. Id.

8 In June or July of 2002, Thelen requested that Marland  
9 produce the July 1991 portage. Id. Marland refused to produce the  
10 document and said for the first time that he had destroyed it. Id.  
11 On July 8, 2002, pursuant to the terms of the February 1999  
12 agreement, Thelen gave Marland 30 days' written notice of its  
13 decision to withdraw from representing him. Id. Thelen extended  
14 the notice period once, to August 30, 2002. Doc #98 at 5. Thelen  
15 claims that "[a]fter that date," Thelen's attorney-client  
16 relationship with Marland ended. Id. Presumably, Thelen means  
17 that its attorney-client relationship with Marland ended  
18 immediately after August 30, 2002 (i e, September 1, 2002).

19 Thelen contends that Marland's actions constituted a  
20 material breach of the June 1999 agreement and provided grounds for  
21 rescission, excuse of performance or both. Doc #98 at 6. Thelen  
22 considered any future performance on its part under the June 1999  
23 agreement excused by Marland's breach. Id.

24 On December 19, 2002, Thelen, Marland, and Marland's  
25 European counsel entered a new agreement which replaced "any and  
26 all other agreements among them." Doc #78 at 19. Under the terms  
27 of the December 2002 agreement, Thelen agreed to pay Marland and  
28 European counsel 35% of the fees paid to Thelen by CDOI, in

1 exchange for the parties' mutual release and waiver of all claims.  
2 Id at 19-20.

3 Marland alleges that Thelen used the litigation costs and  
4 the *portage* as a pretense to get Marland to reduce his share of the  
5 recoveries from the litigation. Doc #72 at 37. Marland alleges he  
6 was coerced into signing the December 2002 agreement through  
7 intentional misrepresentations and inadequate representation of  
8 his interests by Thelen. Id at 37-39.

9 Thelen claims that, in reliance on the December 2002  
10 agreement, it continued to expend time and resources on the  
11 litigation and ultimately succeeded in obtaining nearly \$1 billion  
12 in settlements and judgments. Doc #78 at 20. Thelen has paid, and  
13 Marland has accepted, over \$19 million pursuant to the terms of the  
14 December 2002 agreement. Id.

15 On February 13, 2006, Marland commenced an arbitration  
16 proceeding against Thelen in New York City, asserting that the  
17 December 2002 agreement is not fair and is unenforceable and that  
18 the release and waiver provisions of that agreement are void. Id.  
19 Marland alleges that the December 2002 agreement never went into  
20 effect and that the February 1999 and June 1999 agreements remain  
21 valid and binding. Doc #72. Marland claims that it had an  
22 attorney-client relationship with Thelen until February 4, 2005.  
23 Doc #102, Ex A.

24 Thelen initiated this action against Marland, seeking to  
25 enforce the December 2002 agreement and to enjoin Marland from  
26 pursuing the New York arbitration. Doc #1, 11. Thelen maintains  
27 that its attorney-client relationship with Marland ended in 2002.  
28 Supra.

B

Thelen claims that its attorneys on the CDOI case and its executive committee sought and gave legal advice internally in connection with the litigation. Doc #98 at 2, 6-10. This included communications with the firm's general counsel, Wynne Carvill. Id. According to Thelen, Carvill gathered facts, analyzed legal issues, advised firm management of its legal options and represented the firm in its negotiations with Marland and CDOI, as the parties worked toward new agreements in 2002. Id.

Carvill was appointed to the bench and left Thelen in November 2003. Thelen's current general counsel is Robert Blum. Until Marland commenced the arbitration proceeding against Thelen in February 2006, Blum was Thelen's "only litigation counsel." Doc #101 at 7.

C

Marland sought leave of court on November 21, 2006, December 1, 2006 and December 18, 2006 to bring a discovery motion regarding (1) electronic discovery requests, (2) testimony of Thelen's 30(b)(6) witnesses, and (3) Thelen's privilege log. Doc ##66, 77, 87. At the hearing on January 3, 2007, the parties reported that they had resolved the electronic discovery dispute. The parties also agreed that a motion on Thelen's FRCP 30(b)(6) witnesses was premature. The court requested additional briefing on the privilege log issues.

The parties submitted simultaneous opening briefs on January 11, 2007. Doc ##98, 99. The parties submitted

\\

1 simultaneous reply briefs on January 16, 2007. Doc ##101, 103.  
2 The matter was heard on January 18, 2007.

3  
4 D

5 The privilege log identifies 64 documents for which  
6 Thelen asserts attorney-client privilege, work product privilege,  
7 or both. Doc #93. The documents contain communications between  
8 and among Carvill, Thelen staff working at the direction of  
9 Carvill, members of Thelen's executive committee, Gary Fontana and  
10 Karl Belgum (the lead attorneys on the CDOI case), and Robert Blum  
11 and Stephen O'Neal (Thelen partners). Doc #98 at 6-10.

12 According to Thelen, documents 1-10, 12, 14, 25-31, 33-  
13 34, 50-51, and 57-64 "show Carvill providing information and legal  
14 analysis of various terms under discussion, answering questions  
15 posed by management, analyzing Thelen's legal options in light of  
16 Marland's admitted destruction of key documents, and analyzing the  
17 potential ramifications of not reaching a new agreement." Id at 7.

18 According to Thelen, documents 11, 13, 15-19, 20, 24, 35,  
19 38-43, 47-48, and 52-56 "reflect Carvill's efforts to advise  
20 Thelen management regarding the progress of negotiations with CDOI  
21 over the terms of an amendment to the CDOI-Thelen fee agreement and  
22 the potential consequences of failed negotiations." Id at 8.  
23 These documents "show Carvill providing information and legal  
24 analysis of various terms under discussion, answering questions  
25 posed by management, analyzing the potential specifications of  
26 CDOI's proposals, and of not agreeing to an amendment at all." Id  
27 at 8-9.

28 \\\



1 According to Thelen, document 46 is a memo from Carvill  
2 to the executive committee providing advice on a partner's  
3 suggestion that the firm withdraw from its representation of RoNo  
4 and CDOI. Id at 9. Document 9 is an email from the same partner  
5 to Carvill asking for Carvill's legal opinion on the February 1999  
6 agreement and the June 1999 fee sharing agreement. Id. Document  
7 49 is an email from Blum to Carvill, various firm partners, and the  
8 executive committee providing analysis on an Attorney General  
9 memorandum that claimed that Thelen had a conflict of interest in  
10 representing RoNo and CDOI. Id. Documents 21-23 and 36-37 are  
11 emails from Belgium to Carvill asking about the agreements Carvill  
12 had negotiated in 2002 and 2003. Id at 10.

13 According to Thelen, documents 32, 44, and 45 are emails  
14 among Carvill and others at the firm discussing negotiation of the  
15 new fee agreement with CDOI. Doc #93.

16 Thelen has not logged certain Blum documents, containing  
17 attorney-client communications and attorney work product, created  
18 after February 5, 2005, when Marland terminated Thelen. Doc #101  
19 at 6-7. In addition to seeking an order compelling production of  
20 the 64 logged documents, Marland seeks an order directing Thelen to  
21 individually log the Blum documents. Doc #99 at 8.

22  
23 E

24 Just prior to and during the hearing on Thelen's  
25 privilege log, the parties raised two additional discovery  
26 disputes.

27 \\  
28 \\  
9

1

One of these new disputes stems from Thelen's deposition of Marland's European counsel, Philippe Brunswick. Brunswick is a named cross-defendant in this action. On January 12, 2007, Thelen deposed Brunswick in New York City. Doc #104 at 1. According to Thelen, just before the deposition commenced, Brunswick provided Thelen with a letter from the Paris Bar stating that Brunswick would be committing a breach of French secrecy and confidentiality rules should he testify regarding any element or fact relating to his representation of any client. Id at 2. Based on this letter, Brunswick refused to answer any questions about Thelen and the ELIC litigation. Id. Thelen seeks a court order compelling Brunswick's deposition testimony. Id. The parties, including Brunswick's counsel, have submitted letter briefs on this issue. Doc ##104, 107, 113.

2

The other recent discovery dispute involves the inadvertent production of certain documents by Marland's counsel, Andrew Hayes ("Hayes").

Specifically, during the January 2007 Brunswick deposition mentioned above, Thelen's counsel sought to use a document that Marland had produced in October 2006. Doc #106-1 at 1. The document was a letter dated August 27, 2002 from Brunswick to Marland and Francois Chateau (Marland's other European counsel). Id. Hayes claimed that the letter was privileged and inadvertently produced. Id.

Prior to this, there had been three other occasions where Hayes claimed that his office had inadvertently produced one or

1 more privileged documents. Id. Accordingly, following the  
2 Brunswick deposition, both sides decided to investigate the  
3 discrepancies in the defense production. Doc #112-1, Exs 17-18.  
4 Hayes reports that, following the Brunswick deposition, he  
5 discovered for the first time that his copy service had erroneously  
6 sent all of Marland's privileged documents to Thelen's counsel,  
7 Keker and Van Nest. Doc #107 at 1.

8 Thelen now seeks an order compelling production of the  
9 August 27 Brunswick letter. Doc #106-1. Marland seeks sanctions  
10 against Thelen including disqualification of Keker for their  
11 alleged misconduct in handling the inadvertently produced  
12 documents. Doc #107. The parties have briefed these issues by  
13 letter. Doc ##106-1, 107, 111-1, 114-1.

## 14 II

### 15 *Thelen's Privilege Log Documents*

16 Federal courts sitting in diversity apply the law of the  
17 forum state on attorney-client privilege issues but apply federal  
18 common law to attorney work product issues. Bank of the West v  
19 Valley Nat Bank of Arizona, 132 FRD 250, 251 (ND Cal 1990).

20 In California, the attorney-client privilege is codified  
21 in Cal Evid Code § 954 and specifies that, subject to certain  
22 exceptions, "the client \* \* \* has a privilege to refuse to  
23 disclose, and to prevent from disclosing, a confidential  
24 communication between client and lawyer if the privilege is claimed  
25 by \* \* \* the holder of the privilege \* \* \*." "Confidential  
26 communication is defined as including 'a legal opinion formed and  
27 the advice given by the lawyer in the course of that [attorney-

1 client] relationship.' \* \* \* [T]he attorney-client privilege  
2 applies to confidential communications within the scope of the  
3 attorney-client relationship even if the communication does not  
4 relate to pending litigation; the privilege applies not only to  
5 communications made in anticipation of litigation, but also to  
6 legal advice when no litigation is threatened." Roberts v City of  
7 Palmdale, 5 Cal 4th 363, 371 (1993) (internal citations omitted).

8 "At its core, the work-product doctrine shelters the  
9 mental processes of the attorney, providing a privileged area  
10 within which he can analyze and prepare his client's case." In re  
11 Grand Jury Subpoena, 357 F3d 900, 907 (9th Cir 2004). "[T]he work  
12 product doctrine only attaches to documents prepared in  
13 anticipation of litigation or for use in trial." Hickman v Taylor,  
14 329 US 495, 511-12 (1947); FRCP 26(b)(3).

## A

17 Assuming that the communications at issue reflect  
18 privileged attorney-client communications as defined by California  
19 law, the issue is whether the attorney-client privilege applies  
20 where a law firm is attorney to both an outside client and to  
21 itself. Thelen argues that it does, citing United States v Rowe,  
22 96 F3d 1294 (9th Cir 1996).

23 In Rowe, a law firm senior partner assigned associates at  
24 the firm to investigate the conduct of another of the firm's  
25 attorneys in handling client funds. When the government attempted  
26 to question the associates in connection with a grand jury  
27 investigation, the law firm claimed attorney-client privilege.  
28 After the trial court ordered the associates to testify, the court

1 of appeals held that the privilege could apply to intra-firm  
2 communications. While Thelen relies on Rowe here, the case  
3 involved the assertion of privilege against a third party. Rowe  
4 does not address whether the attorney-client privilege can be  
5 asserted against the firm's then-current client.

6 Thelen cites no case in which an intra-firm communication  
7 relating to the firm's representation of a client was withheld from  
8 the client under a claim of privilege. The court finds In re  
9 Sunrise Sec Litig, 130 FRD 560 (ED Pa 1989) instructive.

10 In re Sunrise was multidistrict litigation arising out of  
11 the collapse of the Sunrise Savings and Loan Association. One of  
12 the defendants was a Philadelphia law firm that had served as  
13 Sunrise's general counsel. An issue before the court was whether  
14 the firm had properly withheld from discovery on the ground of the  
15 attorney-client privilege a number of documents to and from lawyers  
16 in the same firm who had consulted with each other during the time  
17 when the firm was general counsel to Sunrise and after the Sunrise  
18 litigation against the firm had been instituted. The court  
19 recognized the theoretical existence of an attorney-client  
20 privilege between the law firm as attorney and itself as client.  
21 The court held, however, that:

22 [A] law firm's consultation with in house counsel may  
23 cause special problems which seldom arise when other  
24 businesses or professional organizations consult their in  
25 house counsel. A law firm's representation of a client,  
26 and its ability to meet its ethical and fiduciary  
27 obligations to that client, may be affected by its  
28 representation of another client, even if the second  
client is the law firm itself. So, for example, when a  
law firm seeks legal advice from its in house counsel,  
the law firm's representation of itself (through in house  
counsel) might be directly adverse to, or materially

\\

1 limit, the law firm's representation of another client,  
2 thus creating a prohibited conflict of interest.

3 Id at 595. The court ordered in camera inspection of individual  
4 documents to determine "if the communication implicates or creates  
5 a conflict between the law firm's fiduciary duties to itself and  
6 its duties to the client seeking to discover the communications."

7 Similarly in Veruslaw Inc v Stoel Rives, 127 Wash App  
8 309, 334 (2005), a legal client sued a law firm for malpractice,  
9 and the firm asserted privilege over documents concerning legal and  
10 ethical issues in representing the client, created during the  
11 representation. The court held that whether documents relating to  
12 advice to one attorney given by other members of the firm were  
13 covered by attorney-client privilege required in camera review to  
14 determine whether there was a conflict between the firm's own  
15 interests and its fiduciary duty to the client.

16 Based on these authorities, the court grants Marland's  
17 request to order Thelen to produce the documents listed in its  
18 privilege log. The logged documents relate to the Marland  
19 representation and were created during the Marland representation.  
20 While Thelen states that some of the documents pertain to the CDOI  
21 representation, Thelen represented Marland and CDOI for the same  
22 purpose; and the interests of Thelen, CDOI and Marland intertwined.  
23 As a result, all of these documents implicate or affect Marland's  
24 interests, and Thelen's fiduciary relationship with Marland as a  
25 client lifts the lid on these communications. Accordingly, the  
26 court orders Thelen to produce all the logged documents other than  
27 those that fall within the narrow exception discussed next.

28 \\\

1           The court recognizes that law firms should and do seek  
2 advice about the their legal and ethical obligations in connection  
3 with representing a client and that firms normally seek this advice  
4 from their own lawyers. Indeed, many firms have in-house ethics  
5 advisers for this purpose. A rule requiring disclosure of all  
6 communications relating to a client would dissuade attorneys from  
7 referring ethical problems to other lawyers, thereby undermining  
8 conformity with ethical obligations. Such a rule would also make  
9 conformity costly by forcing the firm either to retain outside  
10 counsel or terminate an existing attorney-client relationship to  
11 ensure confidentiality of all communications relating to that  
12 client. This court declines to follow such a strict rule,  
13 preferring one that is consistent with a law firm in-house ethical  
14 infrastructure. Accordingly, Thelen is to produce some but not  
15 all communications in which a Thelen lawyer seeks or gives advice  
16 on the firm's ethical obligations to Marland.

17           Specifically, while consultation with an in-house ethics  
18 adviser is confidential, once the law firm learns that a client may  
19 have a claim against the firm or that the firm needs client consent  
20 in order to commence or continue another client representation,  
21 then the firm should disclose to the client the firm's conclusions  
22 with respect to those ethical issues. See ABA Model Rule of Prof  
23 Conduct 1.7. See also NY Eth Op 789, 2005 WL 3046319 at 4.

24           In sum, Thelen must produce the documents listed on its  
25 privilege log except for certain documents reflecting consultations  
26 between Thelen lawyers on the firm's ethical and legal obligations  
27 to Marland. Regarding the consultations, Thelen must produce  
28 certain conclusions of those consultations: Thelen must produce any

1 communications discussing claims that Marland might have against  
2 the firm or discussing known errors in its representation of  
3 Marland. Thelen must produce any communications discussing known  
4 conflicts in its representation of Marland or other circumstances  
5 that triggered Thelen's duty to advise Marland and obtain Marland's  
6 consent. Conflicts include any representation - whether of Thelen  
7 itself, CDOI, or another - adversely implicating or affecting the  
8 interests of Marland, when Thelen was receiving information from  
9 and/or providing legal advice to its own lawyers while at the same  
10 time continuing to represent Marland.

11 Finally, the court notes that, while the logged documents  
12 extend through 2003, the parties disagree over when their attorney-  
13 client relationship ended. The court also notes that this issue  
14 relates in part to the merits of the case. Thelen argues that the  
15 attorney-client relationship ended "after" August 30, 2002, which  
16 the court presumes is September 1, 2002. Doc #98 at 5. Marland  
17 argues that the relationship lasted until 2005 on the grounds that  
18 the 2002 agreement, which purportedly terminated the prior  
19 relationship, is invalid and unenforceable. Doc #102, Ex A. The  
20 court finds that Marland's argument is neither frivolous nor made  
21 for an improper purpose. Accordingly, for purposes of this motion  
22 only, and without reaching the merits of the underlying claims, the  
23 court orders production of all the logged documents, subject to the  
24 limited exception described above. The court will refer this  
25 dispute to a United States Magistrate Judge to review in camera all  
26 of Thelen's logged documents and determine which ones should be  
27 produced to Marland, based on this directive.

28 \\\



## B

The court notes that Thelen has asserted two privileges for most of the logged documents: attorney-client and work product. While the above cases only address attorney-client privilege, the court finds the same issues of conflict pertain to the work product protection:

Like the attorney-client privilege, protection afforded by the work-product doctrine is not absolute. Clearly, lawyers cannot cloak themselves in its mantle when their mental impressions and opinions are directly at issue. The doctrine does not apply where a client, as opposed to some other party, seeks discovery of the lawyer's mental impressions. It cannot shield a lawyer's papers from discovery in a conflict of interest context anymore than can the attorney-client privilege.

Koen Book Distributors, Inc v Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, PC, 212 FRD 283, 286 (ED Pa 2002) (internal citations omitted) (Court ordered production of firm's communications to counsel it retained after client threatened legal malpractice proceedings where firm had continued to represent client). Similarly, the court finds that Thelen's logged documents should be produced here, subject to the above guidelines.

## III

*The Blum Documents*

Under FRCP 26(b)(5):

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

1 Accordingly, Marland's request to direct Thelen to log Blum  
2 documents created between February 4, 2005 and the commencement of  
3 the New York arbitration proceeding is GRANTED. The court also  
4 DIRECTS Marland individually to log otherwise responsive documents  
5 for which it is claiming privilege for this time period.

6  
7  
8 IV

*Brunswick Testimony*

9  
10 The court lacks jurisdiction to compel Brunswick's  
11 testimony at this time. The deposition subpoena issued from the  
12 Southern District of New York, and the deposition occurred in New  
13 York City. Doc #113. Under FRCP 45(a)(2), a motion to compel  
14 concerning a subpoena must be presented to the court for the  
15 district in which the deposition would occur. See Adv Comm note to  
16 1991 amendment ("[T]he court in whose name the subpoena issued is  
17 responsible for its enforcement.") Thelen does not dispute that  
18 this court is unable to grant the relief it requests. Accordingly,  
19 the court DENIES Thelen's request that it issue an order compelling  
20 Brunswick's testimony, although the court does not foreclose  
21 reconsideration of the issue at a later time upon procedurally  
22 proper request.

23  
24 V

25 *Marland's Inadvertently Produced Documents*

26 Last, the court addresses both parties' requests  
27 surrounding Marland's inadvertently produced documents, including  
28 the August 27, 2002 Brunswick letter.

A

*Thelen's Request to Compel Brunswick Letter*

Thelen seeks an order compelling production of the Brunswick letter. Thelen contends that the Brunswick letter is not privileged because: (1) Marland's delay in asserting the privilege and failure to include the document on his privilege log created a waiver, and (2) the crime-fraud exception to the attorney-client privilege applies. The court need only address Thelen's first argument to conclude that it is correct.

Thelen states that Marland's counsel never identified Brunswick's letter "on any version of Marland's privilege log: not the log produced on October 3; not the draft revised log produced on October 27, and not the second revised log produced on January 2, 2007." Doc #111-1 at 6. Marland's counsel does not dispute that he never logged this document and offers no explanation.

As stated above, FRCP 26(b)(5) requires a detailed showing to withhold discovery on privilege grounds. The law is well settled that failure to produce a privilege log or production of an inadequate privilege log may be deemed waiver of the privilege. See, e g, Burlington Northern & Santa Fe Ry Co v US Dist Court for Dist of Mont, 408 F3d 1142 (9th Cir 2005) (railroad waived discovery privileges claimed in privilege log it filed in response to request for production of documents in environmental litigation, where railroad filed privilege log five months after the document request, rather than within the 30-day time limit for filing written response to discovery request, was a sophisticated corporate litigant and a repeat player in environmental lawsuits

1 and regulatory action involving site that was subject of the suit,  
2 and made substantive changes to privilege log after producing it);  
3 Universal City Development Partners, Ltd v Ride & Show Engineering,  
4 Inc, 230 FRD 688 (MD Fla 2005) (Litigant waived attorney-client  
5 privilege for documents it produced where litigant did not provide  
6 privilege log or generally describe documents to which it asserted  
7 privilege until eight months after written response was due, log  
8 failed to identify capacity of many recipients and did not provide  
9 sufficient information to assess claim of privilege, litigant's  
10 counsel reviewed all 13,000 pages of documents in single evening,  
11 and litigant did not review production after it learned that one  
12 privileged document had been turned over to opponent to determine  
13 whether other privileged documents had been produced.)

14           Weighing all the factors here, the court finds that  
15 Marland has waived any privilege for the Brunswick letter. Marland  
16 asserts that all of its privileged documents were inadvertently  
17 produced, Doc #107 at 1, and that the bates numbers for these  
18 documents range from 1 to 533. Doc #115 ¶4. Thelen states that  
19 only 24 of these documents appear on the privilege log. Doc #111-1  
20 at 2. Hayes does not dispute that he failed to log the additional  
21 documents and gives no explanation. Moreover, Hayes was put on  
22 notice at least three times prior to the Brunswick deposition that  
23 he had produced privileged documents and that there were  
24 discrepancies between what Keker received and what Hayes intended  
25 Keker to receive. Doc #111-1 at 3-4. Specifically, Brunswick's  
26 deposition was the third consecutive deposition conducted by Thelen  
27 in which Hayes asserted that a privileged document was  
28 inadvertently produced. Even prior to that, Keker attorneys had

1 notified Hayes that they had found what appeared to be two  
2 privileged defense documents. Id at 3. Keker contends that it  
3 regularly prompted Hayes to send a revised privilege log and that  
4 Hayes revised his privilege log twice. Id at 4, 6. Yet Hayes  
5 never logged the Brunswick letter. Id at 6. Hayes does not  
6 dispute any of this. The court therefore finds that Marland failed  
7 timely and adequately to make his objections.

8 The court also notes that, while Hayes reports that he  
9 inadvertently produced *all* of Marland's privileged documents,  
10 Marland does not move to compel return of those documents. Doc  
11 ##107, 114-1. Rather, Marland seeks sanctions and mentions no  
12 other relief. Id. Accordingly, the court finds that Marland has  
13 waived any privilege claim over the Brunswick letter.

14  
15 B

16 *Marland's Requests for Sanctions Including Disqualification of*  
17 *Thelen's Counsel*

18 Marland seeks an order imposing sanctions on Thelen  
19 including disqualification of Keker for alleged misconduct in  
20 Keker's handling of the inadvertently produced documents. Doc  
21 ##107, 114-1. Marland contends that, based on the scope of  
22 Marland's privilege claims regarding communications from Brunswick,  
23 Keker knew that Marland had produced many privileged documents and  
24 failed to comply with its ethical obligation to promptly notify  
25 Marland's counsel and refrain from examining the materials. Doc  
26 #114-1 at 1-2. The court disagrees.

27 Marland urges the court to apply ABA Comm on Ethics and  
28 Prof Responsibility, Formal Op 92-368, which states:

1 A lawyer who receives materials that on their face appear  
2 to be subject to the attorney-client privilege or  
3 otherwise confidential, under circumstances where it is  
4 clear they were not intended for the receiving lawyer,  
5 should refrain from examining the materials, notify the  
6 sending lawyer and abide the instructions of the lawyer  
7 who sent them.

8 Doc #107.

9 Thelen points out that this opinion was withdrawn by the  
10 ABA in 2005 and replaced with ABA Formal Ethics Opinion 05-437,  
11 which states:

12 A lawyer who receives a document from opposing parties or  
13 their lawyers and knows or reasonably should know that  
14 the document was inadvertently sent should promptly  
15 notify the sender in order to permit the sender to take  
16 protective measures. To the extent that Formal Opinion  
17 92-368 opined otherwise, it is hereby withdrawn.

18 Doc #111-1.

19 Under either authority, the first question is whether the  
20 receiving lawyer had reason to know that the documents were subject  
21 to a claimed privilege. Marland's only argument is that Keker knew  
22 Marland was asserting privilege over communications from Marland's  
23 European counsel, including Brunswick, that were not shared with  
24 Thelen. Doc #114-1 at 1-2, 5-6. The court finds that blanket and  
25 general objections do not provide sufficient detail about the  
26 documents in this case in order to trigger the obligations under  
27 the foregoing ethical rule. This is why FRCP 26(b)(5) requires a  
28 detailed showing to withhold discovery on privilege grounds. See  
Universal City Development Partners, Ltd v Ride & Show Engineering,  
Inc, 230 FRD 688 (MD Fla 2005). Indeed here, Thelen points out  
that Marland had produced nearly 800 pages of communications  
between and among Brunswick, Marland, and Chateau. Doc #112-1 at  
8.

1 Even as to the 24 inadvertently produced documents that  
2 Marland *did* log, the court cannot find an ethical violation.  
3 Marland did not provide bates numbers on its log. *Id* at 7.  
4 Marland cites no authority, and the court knows of none, requiring  
5 a receiving party to cross-check documents produced against the  
6 producing party's privilege log. Nonetheless, where Keker became  
7 aware of logged documents that had been produced, it notified Hayes  
8 immediately. *Id* at 2. Following the Chateau deposition, the  
9 second consecutive deposition where Hayes asserted that a  
10 privileged document was inadvertently produced, Keker emailed Hayes  
11 stating: "You have indicated at various times that your office  
12 inadvertently produced one or more privileged documents from Mr  
13 Marland. In order to be sure we are understand [sic] fully the  
14 documents you believe are privileged and were inadvertently  
15 produced, please provide us promptly with a list of these  
16 documents, and a revised privilege log." Doc #112-1 Ex 13. Hayes  
17 responded: "I am not aware of any other inadvertently-produced  
18 documents." *Id*.

19 Finally, following the Brunswick deposition, Keker *did*  
20 undertake its own investigation into the discrepancies by cross-  
21 checking Marland's production against the log and then promptly  
22 notifying Hayes that it had found 24 logged documents in the  
23 production. Doc #112-1 at 8-9. Because the log did not include  
24 bates numbers, Keker associates and staff were forced to cross-  
25 check the documents using the date, author, recipient, and  
26 description information on the log, taking several days. *Id*.

27 \\  
28 \\  
29

1 Marland does not dispute this. "We note that whenever a  
2 lawyer seeks to hold another lawyer accountable for misuse of  
3 inadvertently received confidential materials, the burden must rest  
4 on the complaining lawyer to persuasively demonstrate inadvertence.  
5 Otherwise, a lawyer might attempt to gain an advantage over his or  
6 her opponent by intentionally sending confidential material and  
7 then bringing a motion to disqualify the receiving lawyer." State  
8 Compensation Ins Fund v WPS, Inc, 70 Cal App 4th 644, 657 (1999).  
9 Accordingly, the court does not find an ethical violation in Thelen  
10 or Keker's handling of the documents and DENIES Marland's request  
11 for sanctions.

12  
13 VI

14 For the reasons discussed above, the court will refer  
15 this matter to Chief United States Magistrate Judge Larson for  
16 random assignment to a United States Magistrate Judge. Thelen  
17 shall within two days of entry of this order submit all of its  
18 logged documents under seal to the assigned magistrate judge, who  
19 is directed to review the documents in camera as soon as  
20 practicable. The assigned magistrate judge shall determine which,  
21 if any, of the documents can be withheld based on the limited  
22 exception described above. The court ORDERS Thelen to produce to  
23 Marland all documents falling outside of the exception as  
24 determined by the magistrate judge. Such production shall be made  
25 within two days of the magistrate judge's determination.

26 Additionally, as discussed above, the court DIRECTS both  
27 Marland and Thelen to revise their privilege logs to include  
28 documents created between February 4, 2005 and the commencement of



1 the New York arbitration. The court DENIES without prejudice  
2 Thelen's request for an order compelling Brunswick's deposition  
3 testimony. The court GRANTS Thelen's request to compel production  
4 of the August 27, 2002 Brunswick letter and ORDERS Marland to  
5 produce that letter. The court DENIES Marland's request for  
6 sanctions including disqualification of Thelen's counsel.

7 The court has received Thelen's letter of February 20,  
8 2007, Doc #128, requesting a conference regarding a dispute over  
9 the continuation of Marland's deposition. The parties are to  
10 appear for a conference on February 23, 2007 at 9:00 am.

11  
12 SO ORDERED.



13  
14 VAUGHN R WALKER  
15 United States District Chief Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28